



REPUBLIC OF KENYA



KENYA LAW
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**Gisiri & 3 others v Kisii University (Petition 25 of 2020)
[2023] KEELRC 116 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 116 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION 25 OF 2020
CN BAARI, J
JANUARY 26, 2023**

BETWEEN

**ZACHARY BORI GISIRI 1ST APPLICANT
SIAMBE NYAMINA 2ND APPLICANT
TIMOTHY NYAKI GITUNO 3RD APPLICANT
SAMWEL NYANGAU 4TH APPLICANT**

AND

KISII UNIVERSITY RESPONDENT

RULING

1. Before court is the petitioners' application dated September 27, 2022, brought pursuant to order 17 rule 2(6) of *Civil Procedure Rules*. The petitioners seek reinstatement of the petition herein which had been dismissed for want of prosecution.
2. The application is supported by grounds on the face thereof and the affidavit of one Timothy Nyaki Gitunyo, the 2nd petitioner herein. The basis of the application is that the petition was dismissed for want of prosecution by an order delivered by this court on January 24, 2022.
3. The petitioners contend that they were acting in person with 1st petitioner having authority to plead on behalf of all the petitioners, and that the 1st petitioner suffered ill health in August, 2021 to May, 2022 when he succumbed to his illness.
4. It is the petitioners' assertion that the 1st petitioner having been taking lead, the procedural notice for dismissal must have been sent to him at the time he was in hospital.



5. The petitioners state that they all are former employees of the respondent, and that the respondent will not suffer any prejudice if the suit is reinstated. They further pray that this court considers the peculiar circumstance on the matter.
6. The petitioners further aver that the application herein, has been made within reasonable time, and that the death of the lead Petitioner resulted in miscommunication, hence the delay is explainable.
7. The petitioners submit that the application has been made within reasonable time, and pray that it is allowed and directions given on its disposal.
8. The respondent opposed the application *vide* a replying affidavit sworn by Seth Ayunga Onguti on November 3, 2022. It is the respondent's contention that this court has not been told why this petition was not prosecuted between January, 2021 to August, 2021, when the 1st petitioner was taken ill, or why the other petitioners did not continue with the prosecution of the petition.
9. The respondent asserts that this is not a representative suit, and hence each of the petitioners had a personal interest in the subject matter of litigation, and to use the 1st petitioners' predicament is not tenable excuse.
10. The application was urged orally before court and parties reiterated their pleadings.
11. The respondent submits that suits belong to litigants and litigants must personally show interest. They sought to rely in the case of *Charo Shubuli Randu vs Karisa Nzai & another* (2018) eKLR to emphasize this position.
12. The respondent avers that the petition relates to contracts that were time bound, and which have since lapsed, and prays that the application be dismissed with costs.

Determination

13. The parties herein were issued with notice to show cause why this suit should not be dismissed for want of prosecution, and which notice came up for hearing on January 25, 2022.
14. Despite service, none of the parties attended court resulting in the dismissal of the petition for want of prosecution. The petitioners now seek its reinstatement on the basis that their lead in the suit, fell ill and succumbed to his ailment and which resulted in miscommunication on the continued prosecution of the petition.
15. Rule 22 of the *Employment and Labour Relations Court (Procedure Rules)* states: -
 - (1) Where a hearing notice was served on the parties and an affidavit of service has been filed, the court may proceed with the case before it in the absence of any party thereto if—
 - (a) the party has indicated that it does not wish to attend the hearing;
 - (b) the party fails to appear for the hearing without providing any reasons; or
 - (c) the court is not satisfied with the reasons forwarded to it by that party for non-attendance.
 - (2) Subject to paragraph (1), where a party fails to attend court on the day fixed for hearing, the court may dismiss the suit except for good reason to be recorded.” (emphasis mine)



16. In *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -v- Augustine Kubede* (1982-1988) KAR, it was held:

“The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties”

17. It is now settled that the tests to apply in an application to reinstate a suit, are firstly, whether there are reasonable grounds to reinstate, the prejudice that the defendant would suffer if reinstatement of the suit was made, against the prejudice the plaintiff would suffer if the suit is not reinstated. (See *John Nabashon Mwangi –vs- Kenya Finance Bank Limited (in Liquidation)* [2015 eKLR])

18. The petitioners ground for not prosecuting the petition is illness and subsequent death of their lead petitioner who received communication on the suit on behalf of his co-petitioners.

19. The petition herein was dismissed on January 24, 2022 and this application filed on September 27, 2022. This is eight (8) months later.

20. In *London Distillers (K) Limited v Philip Kipchirchir & 2 others* (2007) eKLR, Warsame J held that delay is an affront to the administration of justice and is something to be deplored for being repugnant to justice.

21. Further, Gikonyo J in *Fran Investment Ltd v G4S Security Services Ltd* (2015) eKLR, stated thus:

“It is well understood in the legal reality that dismissal of a suit without hearing it on merit is a draconian act. But that reality should be checked against another equally important constitutional demand that cases should be disposed expeditiously, which is founded upon the old adage, and now an express constitutional principle under article 159 of the Constitution, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the plaintiff.”

22. Considering the number of petitioners in this suit, and the fact that this is not a representative suit. The reasons given for failure to prosecute the petition are neither sufficient nor adequate to answer to the inordinate and inexcusable delay in prosecuting the petition. There were still three petitioners with capacity to prosecute the suit, but they did not.

23. I find no merit in the application and is for dismissal. The petitioners’ application is dismissed.

24. I make no orders as to costs.

25. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 26TH DAY OF JANUARY, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Timothy Nyaki 3rd Petitioner Present in person

Mr. Kebungo h/b for Mr. Nyamorongi for the Respondent

Ms. Christine Omollo- C/A

